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Foreword for Michael Harris, “A Right of Ethical Consideration for Non-Human Animals”

Martha C. Nussbaum¹

It is an honor and a pleasure to introduce Michael Harris’s important article. I have long admired Harris’s work as the Director of the Wildlife Division of Friends of Animals, where, as a creative and brilliant lawyer, he has done remarkable work, both as an advocate for animals in legal actions of many kinds, a few of which he mentions in this article, and also as an inspiring leader of an increasingly numerous and powerful legal team. Now, however, Harris articulates the bold theory that undergirds his legal practice.

Harris is correct: our world is at a crossroads. A new ethical consciousness is arising, gradually supplanting many centuries of obtuseness. No longer is it simply taken for granted that non-human animals are mere objects or property, to be used as humans please. Increasingly people feel ethical concern, not only for domesticated animals, but also for animals in the wild. And concern is not limited to pain and suffering: it extends, increasingly to the “capabilities” of animals for free movement, for relationships with creatures of their own kind, for pleasure and perception and play, in short for a form of life that is their own. And yet law lags behind: animals have not yet been given standing in any legal proceeding, U.S. or international.

Competing accounts of the best philosophical basis for animal entitlements are emerging. (I myself am writing a book to be called *Justice for Animals: A New Theory of Animal Welfare*, and to be published in 2022 by Simon and Schuster, where I use my Capabilities Approach, to which Harris kindly refers, as the basis for my own preferred account.) Harris’s article proposes a bold first step that can be enthusiastically welcomed by my own theory and by others: namely, a right of ethical consideration, a right to have one’s good made the subject of a genuinely ethical deliberation. Right now, deliberation about animals in law and politics is almost never ethical in the sense of being concerned ethically with the animals’ own good. So simply getting the good of animals into the discussion, onto the table, is a step that would revolutionize all legal deliberations.

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Harris convincingly argues that a genuinely ethical deliberation should have three ingredients: philosophy, science, and law. He shows why an interdisciplinary cooperation among all three disciplines is urgently needed, and he gives some illustrations of legal deliberations informed in the way he proposes. Sometimes these legal proceedings became ethical more or less by chance. In the example involving whales and the Navy's sonar program, the Marine Mammal Protection Act was a rare case of a statute that asked judges to consider the welfare of individual animals, and not simply species survival. The interpretation of the statute was ethical in a further way, taking account of the whales' capabilities, not simply of pain and harm – probably because the judges concerned had an ethical awareness of whale lives that informed their deliberations. In other cases, Harris's own creative lawyering supplied the ethical dimension. But our world should not depend on isolated or chance results in order to become more ethical. We need an ethical consensus, here and now, that non-human animals are not mere property. They are intelligent, sentient beings with a good of their own and a form of life of their own.

There will be many difficult questions ahead, and many conflicts. But if humanity can take the first step of committing to a genuinely ethical form of deliberation about the good of non-human animals, that is already a radical step into a new era, the era of a genuinely multi-species society.

A Right of Ethical Consideration for Non-Human Animals

Michael Ray Harris²

We must fight against the spirit of unconscious cruelty with which we treat the animals. Animals suffer as much as we do. True humanity does not allow us to impose such sufferings on them. It is our duty to make the whole world recognize it. Until we extend our circle of compassion to all living things, we ourselves will not find peace.

--Albert Schweitzer

Introduction

For millennia, humans have philosophized over the appropriate legal status and rights due to other species with whom we share this planet.³ Given this lengthy discourse, it is not difficult to understand how many current scholars might conclude that while the idea of legal rights for animals remains “theoretically interesting,” it is “far removed” from practical reality.⁴ There is, however, an unmistakable difference in the conversation about animal rights today. It is no longer a discussion reserved for the scholarly. The question over legal rights for some, if not all, animals, has become a subject of intense public debate fueled by shared influences:⁵ the expanding number of animal activist organizations;⁶ increased

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3. Ramona Ilea, *From Pythagoras to Today: Animals and Philosophy 101*, OUR HEN HOUSE (Feb. 4, 2013), <https://perma.cc/8Q6P-9USX>; Joshua S. Sias, *Ancient Animal Ethics: The Earliest Arguments for the Ethical Consideration of Nonhuman Animals*, 2 THE DOWNTOWN REVIEW, Issue 1 at 1 (2016) (examining the status of animals ethics from the time of the ancient Greeks to modern times).

4. Taimie L. Bryant, *Symposium: Living on the Edge: The Margins of Legal Personhood: Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals as property, and the Presumed Primacy of Humans*, 39 RUTGERS L. REV. 247, 247 (2008).

5. See Richard L. Cupp, Jr., *Animals as more than “Mere Things,” But Still Property: A Call for Continuing Evolution of the Animal Welfare Paradigm*, 84 U. CIN. L. REV. 1023, 1025 (2016); Sias, *supra* note 3, at 1.

6. For a discussion and list of animal rights organizations and activists, see *Animal Rights Activists and Organizations*, SPEAKING OF RESEARCH, <https://perma.cc/DMB4-2XDV> (Ironically, my organization, Friends of Animals, founded in 1957 was one of the first groups to distinguish between animal welfare and rights, is not listed on this page.)

awareness of the environmental and health benefits of a vegetarian or vegan diet;⁷ convincing evidence that many animals are sentient;⁸ mainstream media coverage of the lives of animals and human violence against them;⁹ and a surge in litigation over the legal status of animals like elephants, chimpanzees, and whales.¹⁰

This public attention is leading to tangible changes in how animals are perceived pragmatically, scientifically, and legally. Pragmatically, a significant (and increasing) number of people are expressing their indignation over the suffering animals endure at the hands of humans.¹¹ In recent years, we have seen deep public backlash to the continued use of wild animals for entertainment,¹² pets,¹³ and as hunting trophies.¹⁴ At the same time, while humans continue to consume millions of farm animals each year, there is a steady, appreciable decline in meat consumption in many countries, including the United States.¹⁵

The scientific view of animals in our world is also greatly enlightened today. Just a few decades ago, scientists largely viewed non-human animals

7. See e.g., James McWilliams, *The Evidence for a Vegan Diet*, THE ATLANTIC (Jan. 18, 2012), available at <https://perma.cc/W7TY-BK6F>.

8. See *infra* at Part C.

9. See *infra* notes 10-12.

10. See Cupp, *supra* note 5, at 1025 n. 1.

11. As recognized in a 2015 Gallup poll, today almost a third of Americans, 32%, believe animals should be given the same rights as people, while 62% say they deserve some protection but can still be used for the benefit of humans. Rebecca Riffkin, *In U.S., More People Say Animals Should Have Same Rights As People*, GALLUP (May 18, 2015), available at <https://perma.cc/TZH3-4XSS>; see also Cupp, *supra* note 5, at 1031-32.

12. Probably the most well-known example is the so-called “Blackfish Effect”, involving public reaction to captivity of whales and other marine animals by SeaWorld and other entertainment-based aquariums after the release of the 2013 documentary Blackfish. See Mihir Zavari, *SeaWorld Agrees to Pay \$5 Million in ‘Blackfish Effect’ Case*, N.Y. TIMES, Sept. 20, 2018, at B3. Another example is the public outrage caused by the export of 18 wild elephants from Eswatini to 3 U.S. zoos in 2016. See Tal Fox, *American zoos fly 18 elephants out of Swaziland despite protests by animal rights campaigners*, INDEPENDENT (Mar. 12, 2016), <https://perma.cc/XQ5W-29E4>; Charles Siebert, *The Swazi 17*, N.Y. TIMES MAGAZINE, July 14, 2019, at 26.

13. See Erin Mulvaney, *Bill would scratch big cats as pets*, HOUSTON CHRONICLE (Mar. 14, 2013), <https://perma.cc/4KN4-5V4H>; *Should Exotic Animals be Kept as Pets?*, NATIONAL PUBLIC RADIO (Mar. 4, 2009), <https://perma.cc/8KNZ-XKN8>.

14. Jani Actman, *Cecil the Lion Died Amid Controversy—Here’s What’s Happened Since*, NATIONAL GEOGRAPHIC (Oct. 15, 2018), <https://perma.cc/HUN2-VGKZ> (retelling the story of the killing of Cecil the lion by U.S. dentist Walter Palmer, an act “sparking an international outcry and greater scrutiny of trophy hunting for the heads, skins, or other body parts of wild animals”); Nick Allen, *Texas big game hunter Corey Knowlton kills black rhino in Namibia*, THE TELEGRAPH (May 20, 2015), <https://perma.cc/C42A-6K72> (“The hunter who received death threats after bidding \$350,000 (£225,000) at auction for the right to shoot the rare animal, killed it on camera.”).

15. *Report: Meat in Decline*, WORLD PRESERVATION FOUNDATION, <https://perma.cc/BF9H-6GFL>.

as mere “biological units” that required specific conditions—proper habitat, foods, temperature, etc.—to successfully reproduce and maintain a viable population.¹⁶ While some animals were proved more intelligent than others, science greatly ignored any evidence of sentience, such as self-awareness, feelings, and emotions. While this type of scientific thinking continues to exist, it is far more usual for a scientist to now view animals as beings capable of living their own meaningful lives. This is exemplified in the pioneering work of Frans de Waal¹⁷ and the modern field of “Compassionate Conservationism.”¹⁸

Legally, animals are still given very little protection from harassment or harm. There are very few examples of an animal being granted what we might consider to be a legal right,¹⁹ with no such cases at all in the United States.²⁰ This is not to say, however, that judges, legislators, regulators, and other legal officials are immune from the changing perception of animals. Like in science, there is genuine evidence that the mindset toward animals in the law is softening. Through refined word selections and modest adjustments in status, recent legal proclamations about animals reflect acceptance of their sentience. For example, while we have long had laws that seek to prevent the physical infliction of pain on some domesticated animals,²¹ we have seen recent bold attempts to legally prevent emotional and psychological injury as well. This includes near outright bans on

16. See *infra* Part D.

17. See Mark Leviton, *Not So Different After All: Frans de Wall On Animal Intelligence and Emotion*, THE SUN, July 2020, 5–15.

18. See MARC BEKOFF, *REWILDING OUR HEARTS: BUILDING PATHWAYS OF COMPASSION AND COEXISTENCE* 78–83 (New World Library, 2014).

19. A recent example is the 2019 decision by the High Court of Punjab and Haryanain in India. In that case the court recognized under the Indian constitution all animals in the animal kingdom, including avian and aquatic species, as legal entities. *Karnail Singh and Others v. State of Haryana*, (2019) 533 CRR 2013 (Pun. & Har. HC) (India).

20. See Cupp, *infra* note 5, at 1025–26.

21. See *infra* Part I. B.

capturing some animals—whales,²² chimpanzees,²³ and most recently African elephants²⁴—to force them into an undoubtedly miserable life of captivity.

Given these encouraging developments, I would propose that an even loftier goal is imaginable: there will soon be a generation of animals roaming the Earth that represent the first of their species to have legal rights and safeguards. That is, genuine laws preventing their mental, emotional, social, and physical suffering at the hands of humans. This may not come simultaneously for all animals, but it is certainly a vision for some species that is no longer merely theoretical.

Now, I know what you are thinking. Humankind is simply incapable of such a grand gesture to another species. Indeed, we have yet to extend such a system of rights and safeguards equally among the members of our own species. Yes, humans can be terrible, and at any point in time there is ample evidence of this fact. There is also, however, a great deal of kindness in us.²⁵ Overall, our collective history has been one of working toward (albeit in fits and starts) a system for ethical consideration for the well-being of other humans. And we are starting to see such considerations extend to other animals.

What is needed, however, is an accelerant. An approach to animal rights that will both bind and escalate the pragmatic, scientific, and legal advancements experienced recently. There are many bidders for this honor. The idea that animals feel pain and can suffer has long been considered an

22. In 2005, Costa Rica became the first country to ban cetacean captivity. *Decree Prohibits Capture of Whales and Dolphins*, THE TICO TIMES (Aug. 26, 2005), <https://perma.cc/DV9M-BTBQ>. California state imposed a similar ban in 2016. *Protection of orcas: unlawful activity*, Cal. Legis. 2305 (2015-2016), <https://perma.cc/4Z6A-GB88>; Canada has also banned cetaceans from being bred or kept in captivity. Amy Held, *Canada Bans Keeping Whales and Dolphins in Captivity*, NATIONAL PUBLIC RADIO, (June 11, 2019), <https://perma.cc/4P6T-S4ZD>.

23. In 2015, U.S. Fish & Wildlife Service listed all chimpanzees as endangered, wherever found. Previously, FWS had separately classified captive and wild chimpanzees, with the former not receiving the status of endangered. U.S. Fish & Wildlife Serv., 50 C.F.R. §17.40 (2015), <https://perma.cc/YR86-AFLF>. Likewise, all African countries where chimpanzees reside have laws in place to prevent capture and trade. Jason Goldman *Chimpanzees Should Not Be Used in TV or Movies* SCIENTIFIC AMERICAN: THE THOUGHTFUL ANIMAL (Oct. 12, 2011), <https://perma.cc/883E-4JLG>. Chimpanzees are awarded the highest level of protection under the Convention on International Trade in Endangered Species (CITES) and can only be exported from West Africa under narrow exceptions. David Shukman & Sam Piranty, *The secret trade in baby chimps*, BBC NEWS (Jan. 30, 2017), <https://perma.cc/F8P7-Q42J>.

24. The Convention on International Trade in Endangered Species (CITES) recently instituted a ban on taking baby African elephants from the wild and selling them to zoos. *Zoo trade in baby elephant banned internationally*, BBC NEWS (Aug. 27, 2019), <https://perma.cc/Q7EU-VV4H>.

25. See Eoin O'Carroll, *Why Are Humans So Kind, Yet So Cruel?*, THE CHRISTIAN SCIENCE MONITOR (Mar. 6, 2019), <https://perma.cc/K3C4-JKLF>.

instrument for promoting their legal rights.²⁶ The high levels of intelligence that some non-human animals possess is yet another vehicle offered by some theorists.²⁷ More recently, arguments for legal personhood status have been promoted based on evidence that some animals possess a high sense of autonomy and self-awareness.²⁸ All of these theories have been extensively critiqued by scholars and practitioners, and no doubt all have merits and flaws.

In this article, I propose an approach to animal rights that centers on the idea of a right of ethical consideration. While this right is a legal one, it is designed to draw upon the advancements of our scientific knowledge of the emotional responses and social behaviors of other species. It is not intended to require specific changes in human behavior toward animals (at least not directly), but instead to fuel our practical understanding of the meaningful lives of other animals. Simply put, we must develop a legal system that obligates a more careful consideration of how our actions, however beneficial to our species, may produce harm in the day-to-day lives of other non-human animals.

Currently, the law only seeks to minimize the physical suffering or death of an animal, or loss of an animal's habitat, when sanctioning human activity.²⁹ Increasingly, however, we understand that our impact on animals can include psychological and emotional harm. As Martha C. Nussbaum would explain it, our current legal system fails to respect species-specific, basic capabilities, whether bodily integrity, play, sense/imagination/thought, emotion, practical reason, affiliation, or some other capability unique to that animal.³⁰

A right of ethical consideration as envisioned here is a legal obligation on our governmental decision-makers (and perhaps corporations) to fully examine how human actions degrade the types of lives animals are trying to lead. Such a right is not based solely on our compassion or empathy for an animal, but on moral and scientific principles that we can justify by argument. Our decision-making processes must embrace our ever-expanding knowledge of how human involvement or interference with an animal diminishes one or more of that animal's basic capabilities. In other words, the reason to focus on the ethical treatment of animals is because of them, not because of us. What we feel is neither here nor there. What matters is the impact we have on an animal's life—whether causing physical, mental or emotional pain, or depriving that animal from

26. See *infra* Part II B (1).

27. See *infra* Part II. B (2).

28. See *infra* Part II. B (2).

29. See *infra* Part I. B.

30. Martha C. Nussbaum, *Working with and for Animals: Getting the Theoretical Framework Right with a Foreword By Michael Harris*, 94 DENVER L. REV. 605, 621–23 (2017).

connections and opportunities to live a better life. Whether we feel compassion or not, we are morally obligated to prevent these impacts.

Finally, the right of ethical consideration I seek is not the granting of specific substantive rights for animals, like the right to life, freedom, etc. It is, however, a pathway to strengthening legal protections for animals and future substantive, but appropriate, rights. By requiring decision-makers and the public to engage in active deliberation about the human impact on an animal's ability to live a meaningful life, societal and legal beliefs regarding the rights of non-human animals can more quickly change for the better.

Part I of this paper will examine the current status of animals in our legal system. Not surprisingly, these protections are thin. Most captive animals are considered to be a form of property, while wild animals are free only until their lawful capture (or death). Existing laws protect only a small number of animals from acts of human cruelty toward them. Part II will look at the early foundation of the animal rights movement, primarily through the work of the philosophers. Part II will also consider some of the modern legal theories for animal rights, including the notion of personhood. A good deal of attention is provided to the capabilities approach, which I consider to be an essential component of a right of ethical consideration. Part III will present the fundamentals of a right of ethical consideration. It is argued that such a right is built upon three tiers: philosophical conviction, scientific imagination, and legal ingenuity. Finally, Part IV will consider how a proposed right to consideration might stand up to the critique given to other proposals for animal rights. I argue that the primary advantage a right of ethical consideration has over other proposals, like personhood, is that it does not invoke utilitarian arguments tying rights to individual service to society. An animal is not entitled to ethical consideration because it performs the rights and duties of personhood, but instead because he or she has the ability function within her specific set of capabilities, and to otherwise live a life of meaning.

I. The Standing of Animals in the Law

A. Animals as Property

Any discussion regarding the standing of animals in the law must start with the concept of property. Owned animals—those actually in the possession of individuals, institutions, and corporations—are almost universally considered to be a form of vested personal property.³¹ This designation would apply to an individually owned pet, as well as to the

31. Gary L. Francione, *Animals as Property*, 2 ANIMAL L. i, ii (1996).

billions of animals used in the agricultural, entertainment, research, and captive hunting industries.³²

The more problematic property interest is that in wild animals. As the Supreme Court recognized at the end of the nineteenth century in *Geer v. Connecticut*, “[a] man may lastly have a qualified property in [wild] animals *feroe nature*, propter privilegium, that is, he may have the privilege of hunting, taking, and killing them in exclusion of other persons.”³³ As Justice Field describes this property interest in his dissent:

The wild bird in the air belongs to no one, but when the fowler brings it to the earth and takes it into his possession it is his property. He has reduced it to his control by his own labor, and the law of nature and the law of society recognize his exclusive right to it. The pearl at the bottom of the sea belongs to no one, but the diver who enters the water and brings it to light has property in the gem. He has by his own labor reduced it to possession, and in all communities and by all law his right to it is recognized. So, the trapper on the plains and the hunter in the north have a property in the furs they have gathered, though the animals from which they were taken roamed at large and belonged to no one. They have added by their labor to the uses of man an article promoting his comfort which, without that labor, would have been lost to him. They have a right, therefore, to the furs, and every court in Christendom would maintain it.³⁴

The truth is, since Justinian times there has really been no serious legal dispute that wild animals can be the property of individuals.³⁵ Instead, what was disputed is the extent to which a sovereign—the king or prince—may hold original and perhaps superior title in them even before capture. Thus, in some early “civilized” countries, a sovereign had the right to reserve wild animals to himself and proscribe who had the right to hunt or capture wild animals, as well as where such capture would be allowed.³⁶ *Geer* itself is a

32. See generally, Karen Bradshaw, *Animal Property Rights*, 89 COLO. L. REV. 809, 818 (2018).

33. *Geer v. State of Connecticut*, 161 U.S. 519, 526-27 (1896) (quoting 2 Bl. Com. 394).

34. *Id.* at 540 (Field, J., dissenting).

35. See *id.* at 523 (quoting INSTITUTES OF JUSTINIAN, Book 2, Tit. 1, s. 12).

36. See *id.* at 524 (quoting Pothier, TRAITE DU DROIT DE PROPRIETE, Nos. 27-28); *id.* at 523 (noting that under the “ancient law of the continent of Europe . . . the right to acquire animals *feroe nature* by possession was recognized as being subject to government authority and under its power, not only as a matter of regulation, but also of absolute control”).

remnant of the debate of the sovereign's superior claim in title to wild animals in its jurisdiction.³⁷

Today, “[a] State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of ‘owning’ wild fish, birds, or animals.”³⁸ The “ownership language of cases like *Geer* are now understood as no more than a 19th-century legal fiction expressing ‘the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.’”³⁹ Of course, a wild animal living today is free only to the extent that he or she has yet to be subdued, captured or killed by a human being under whatever regulatory scheme enacted by the state in which the animal finds herself at the time.⁴⁰ Thus, even under this modern analysis, wild animals remain transient property.⁴¹

B. Legal Structures to Punish Cruel and In-Humane Treatment of Animals

While animals are considered property—whether vested or transient—they are not treated by our legal system the same as other forms of personal property. Most of us are free to use and treat our appliances, computers, and even cars in any destructive manner we see fit (except of course to the peril of others). With animals we have managed to create a legal (and moral) fiction that seeks to balance our ownership interest in them with our knowledge that our actions can cause them inordinate pain

37. *Geer* addressed the constitutionality of a Connecticut statute that prohibited the taking of certain bird species for the purpose of transporting them outside of the state. *Id.* at 521. In essence, that state had asserted its control over these wild animals to condition any subsequent property right that one might acquire from capturing or killing these birds. Such interest prohibited one from causing the animal or its carcass from entering the stream of interstate commerce. *Id.* at 530–31. *Geer*, which asserts a doctrine very close to the absolute control over wild animals asserted by older European states, was overruled nearly 80 years later in *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979).

38. *Hughes v. Oklahoma*, 441 U.S. 334–35 (1979) (quoting *Geer v. Connecticut*, 161 U.S. 539–40 (Field, J., dissenting)).

39. *Id.* at 335 (citations omitted). A number of states, however, continue to codify the notion of absolute ownership in their laws. See, e.g., *Hollywood Park Humane Soc’y v. Town of Hollywood Park*, No. SA-03-CA-1312-XR, 2004 U.S. Dist. LEXIS 783, at *11 (W.D. Tex. Jan. 23, 2004) (affirming a Texas statute that states, “all wild animals, fur-bearing animals, wild birds and wild fowl inside the borders of this state are the property of the people of this state”).

40. See U.S. Fish & Wildlife Service, *State Hunting Licenses* (Sept. 19, 2018), <https://perma.cc/7XAS-37YL>.

41. *Geer*, 161 U.S. 519 at 527 (citations omitted) (The possessor “has a transient property in these animals . . . so long as they continue within his liberty, and may restrain any stranger from taking them therein; but the instant they depart into another liberty, this qualified property ceases.”).

and suffering. Professor Gary L. Francione has described this “moral schizophrenia” about nonhuman animals this way:

Social attitudes about animals are hopelessly confused. On one hand, many people regard at least some nonhumans—their “pets”—as members of their families. On the other hand, these very same people think nothing about eating animals other than “pets,” wearing their skins, using them in experiments, or exploiting them for entertainment in films, circuses, zoos, and rodeos. On one hand, we all agree with the notion that it is morally wrong to inflict “unnecessary” pain and suffering on nonhumans; on the other hand, we routinely use animals in all sorts of contexts that could never be considered as involving any coherent notion of necessity.⁴²

This confusion has led us to enact a slew of animal welfare laws designed to essentially categorize non-human animal cruelty into the necessary (which is not prohibited) and the unnecessary (which is made subject to some legal penalty).⁴³ Thus, while today each of the fifty states has an anti-cruelty law on the books,⁴⁴ these laws protect only a small number of animals and fail to constrain to any meaningful extent the overall infliction of horrific suffering on animals.⁴⁵ Only purposeful suffering of specifically enumerated animals is banned.⁴⁶ Kicking or intentionally injuring a dog or house cat may be a crime, but the trapping, poisoning and killing of mice, rats, raccoons, prairie dogs, and other animals is widely accepted (and sometimes encouraged).⁴⁷ Other animals, typically referred to as game, are protected only to the form and timing of their killing.⁴⁸ And

42. Francione, *supra* note 31, at ii.

43. *See id.* Citing Chief Justice Coleridge, Professor Francione puts it this way: “any procedure ‘without which an animal cannot attain its full development or be fitted for its ordinary use may fairly come within the term ‘necessary.’” Not “every treatment of an animal which inflicts pain, even great pain of mutilation, and which is cruel in the ordinary sense of the word is necessarily” cruelty proscribed by law, which is only that pain inflicted for “only for pain inflicted for no legitimate purpose.” *Id.* (citations omitted).

44. Cupp, *supra* note 5, at 1032–33.

45. *See* Bryant, *supra* note 4, at 248.

46. Francione, *supra* note 31, at ii.

47. *See, e.g.,* Taimie Bryant, *Animals Modified: Defining Animals/Defining Human Obligations to Animals*, U. CHI. LEGAL F. 137, 151 (2006) (“Just as a rat is not an animal when the law says she isn’t and is an animal when she says she is, a chicken is not legally an animal unless a specific law defines chickens as animals.”).

48. This is typically done through individual state hunting, fishing and trapping laws.

very few state laws regulate pain and suffering inflicted on the billions of farm animals each year.⁴⁹

Federal law is no better. Three laws primarily regulate the welfare of captive animals. First, the federal Humane Methods of Slaughter Act (“HMSA”),⁵⁰ passed in 1958, requires that some animals be stunned into unconsciousness before slaughter, to minimize pain.⁵¹ Not all animals that we know feel pain are covered, however. Chickens, turkeys and other birds, for instance, are exempt. Indeed, according to one estimate, the law applies to “only about five percent of the close to 10 billion animals slaughtered each year for food.”⁵²

Second, is the Animal Welfare Act (“AWA”),⁵³ enacted more than 50 years ago. As an initial critique, and perhaps because of the HMSA, the AWA excludes from its coverage all animals raised for food.⁵⁴ Even more striking, the AWA also excludes 90% of animals used in research.⁵⁵ As to the estimated 250 species of animals that are covered, the law basically deals only with their transportation and husbandry requirements.⁵⁶ Perhaps distilled to its essence, the AWA is nothing more than a set of minimum standards for food and habitat requirements.

Still, over the course of its existence the AWA has routinely been hailed as a “landmark” animal protection act.⁵⁷ A more recent (and accurate) critique of the AWA, however, exposes the law for what it really is, “ineffective [and] worse, counterproductive.”⁵⁸ As Professor Justin Marceau explains it:

The AWA simplifies and entrenches the particular American schizophrenia about animals—we love some like family, and treat

49. See Animal Welfare Institute, Legal Protections for Animals on Farms (Oct. 2018), available at <https://perma.cc/475N-29PJ>. There are some exceptions, such as minimum cage and enclosure laws in some states for chickens and pigs. See, e.g., Wash. Rev. Code Ann. § 69.25.107 (West); Colo. Rev. Stat. Ann. § 35-50.5-102 (West 2008). Similarly, California has prohibited the production of *foie gras*. See Cal. Health & Safety Code § 25982 (West 2008). However, a number of states have recently enacted so-called Ag-Gag bills that criminalize undercover investigations of factory farms that report on animal cruelty. Matthew S. Schwartz, *Court Strikes Down Iowa’s ‘Ag-Gag’ Law That Blocked Undercover Investigations*, NATIONAL PUBLIC RADIO (Jan. 19, 2019). These laws are being challenged (successfully) by animal advocates for violating the First Amendment of the United States Constitution. *Id.*

50. 7 U.S.C. §§ 1902–1907 (2000).

51. Bryant, *supra* note 4, at 250–51.

52. *Id.*

53. 7 U.S.C. §§ 2131–2159 (2012)

54. Justin Marceau, *How the Animal Welfare Act Harms Animals*, 69 HASTINGS L.J. 925, 930 (2018).

55. Bryant, *supra* note 4, at 249–50.

56. *Id.*

57. Marceau, *supra* note 54, at 927 n.3.

58. *Id.* at 927.

many others like undifferentiated biomass that is well-suited for food, entertainment, breeding, experimentation, and other uses that bring us pleasure or perceived benefits. In this way, the AWA is the ultimate wolf in sheep's clothing. It has legitimized a vast system of animal mistreatment, both through its exemptions and the way it is applied, and it has facilitated the hijacking of the concept "welfare" by the industries and researchers that are regulated by the AWA.⁵⁹

Third, is the recently enacted Preventing Animal Cruelty and Torture Act ("PACT").⁶⁰ Signed into law in 2019, PACT strengthens many state animal welfare laws by making some of the most egregious forms of animal cruelty—specifically crushing, burning, drowning, suffocating, impaling or sexual exploitation—in or affecting interstate commerce or within the territorial jurisdiction of the United States a federal crime.⁶¹ While PACT answers the long-time call of animal advocates for broader federal protection for animals,⁶² it also includes many of the same exceptions from the AWA for "customary and normal" agricultural and veterinary practices.⁶³

As for wild animals, as noted above, modern laws at both the federal and state level are largely designed to regulate the taking of so-called game animals. Other laws, like the federal Endangered Species Act⁶⁴ and the Migratory Bird Treaty Act,⁶⁵ seek to regulate human "take" of certain species to prevent their extinction.⁶⁶ In all, however, the laws that pertain to wild animals are generally not focused on animal welfare, and are

59. Marceau, *supra* note 54, at 928.

60. 18 U.S.C. § 48.

61. 18 U.S.C. § 48(a)(1)–(3).

62. See, e.g., Marcia Clemmitt, *Is the treatment of animals improving?*, CQ RESEARCH (Jan. 8, 2010), <https://perma.cc/7J68-TY5X>; Cara Feinberg, *Are Animals 'Things'?*, HARVARD MAGAZINE (Mar. 2016), <https://perma.cc/ZJC3-SJQF>; *Laws that Protect Animals*, ANIMAL LEGAL DEFENSE FUND, <https://perma.cc/46N7-RP5J>.

63. 18 U.S.C. § 48(d)(1)(a).

64. 16 U.S.C. §§ 1531–1544.

65. 16 U.S.C. §§ 703–712.

66. See, e.g., *People for the Ethical Treatment of Prop. Owners v. United States Fish & Wildlife Serv.*, 852 F.3d 990, 994-95 (10th Cir. 2017) ("The purpose of the ESA is to conserve endangered and threatened species and the ecosystems on which they depend." Further, "The 'cornerstone' of the ESA's protections is a section prohibiting the take of any endangered species without a permit or other authorization."); *Turtle Island Restoration Network v. United States DOC*, 878 F.3d 725, 749 (9th Cir. 2017) (J. Callahan, dissenting) ("The Permit is consistent with this accommodation of competing statutory directives: it allows for the take of migratory birds when paired with measures designed to minimize such take. Neither CBD nor the majority contends that, if such measures are followed, the MBTA's broad goal of conserving migratory birds is threatened.").

designed to reduce pain and suffering only to the extent they codify what some claim to be “humane hunting practices.”⁶⁷

II. Foundations of the Animal Rights Movement

A. Early Foundations

Kinship between humans and other animals in the natural world has been a topic of philosophical discussion since ancient times. While scholars think that Pythagoras is a figure of legend about whom nothing solid is known,⁶⁸ some see him among the earliest of advocates that non-human animals possess intelligence, rationality, and passion.⁶⁹ These are considered the elements of life that allow for sentience and that make the mistreatment of non-human animals unethical.⁷⁰ As one scholar observed: “[f]or Pythagoras man was intimately linked with the rest of the animal kingdom and did not enjoy innate superiority over the other animals. Man was not the image of the divine, but a living being whose only distinguishing characteristic was his greater ability to be trained and participate in intelligence.”⁷¹

It is possible that these observations come from the later phase of his school, and not directly from his writings. Even so, it is at least likely that some of the earliest views about the kinship of species can be attributed to Pythagoras.⁷²

Aristotle’s thoughts on non-human animals are open to question by some, but are often considered aligned with modern animal rights advocacy. Rachel Nussbaum Wichert and Professor Martha C. Nussbaum have described Aristotle as making “keen observations of animals” that “led him to recognize many types of commonality between humans and animals with respect to goal-directed practical reasoning and cognitively rich emotions.”⁷³ However, he did not say much about them ethically, and

67. See, e.g., Miles Olsen, *Proper Shot Placement for Humane Hunting*, MOTHER EARTH NEWS (Feb. 2016), <https://perma.cc/G3F4-SXU2>.

68. Personal communication with Martha C. Nussbaum (Mar. 5, 2020) (on file with author).

69. Sias, *supra* note 3, at 5.

70. *Id.*

71. PETER GORMAN, *PYTHAGORAS: A LIFE* 185 (Routledge 1979).

72. See WALTER BURKERT, *LORE AND SCIENCE IN ANCIENT PYTHAGOREANISM* (Edwin L. Minar, Jr., 1972).

73. RACHEL NUSSBAUM WICHERT & MARTHA C. NUSSBAUM, *The Legal Status of Whales and Dolphins: From Bentham to the Capabilities Approach*, AGENCY AND DEMOCRACY IN DEVELOPMENT ETHICS 259, 271 (L. Keleher & S. Kosko eds., 2019) (discussing Aristotle’s “keen observations” on animals’ “practical reasoning and cognitively rich emotions”).

on occasion argued for human domain over other animals, as had Socrates.⁷⁴ As he explained in his *Politics*:

plants are for the sake of animals, and that the other animals are for the sake of human beings, domestic ones both for using and eating, and most but not all wild ones for food and other kinds of support, so that clothes and other tools may be got from them. If then nature makes nothing incomplete or pointless, it must have made them for the sake of human beings.⁷⁵

For Professor Nussbaum, the low standing of other animals in the natural order and the lack of any ethical discourse by Aristotle is certainly odd given his making such “keen observations” of animal reasoning and emotions, but the two are not necessarily a contradiction. She rebuts, as observed by one of her dissertation students, that “his criticisms of human greed would at least lead in the direction of less-meat eating and other abuses of animals.”⁷⁶

Porphyry, a late Platonist wrote *On Abstaining from Animal Flesh*, which still exists and has insightful things to say about the view of animals in his day. This work is addressed to a friend and former vegetarian who has resumed the consumption of meat.⁷⁷ The work shows that Porphyry’s abstinence from eating animals is motivated by the goal “of freeing oneself from the body and the sensible realm as much as possible.”⁷⁸ However, his ethical concerns over eating animals is set forth as well. Porphyry accords rationality to the animals and emphasizes what they have in common with humans.⁷⁹ He claims that it is plainly unjust to harm those who intend no harm against us, and applies this standard to the animals.⁸⁰ So his vegetarianism is also a matter of justice and kinship.

Finally, animal ethics has been addressed by other historical thinkers beginning with Descartes, who argued that animals, while at times acting in sophisticated ways, could not feel pain and suffer.⁸¹ This assertion was challenged by others that followed him, including Percy Shelly, Voltaire, Jeremy Bentham, John Stuart Mill, Gandhi, and Tolstoy. Each argued that

74. Sias, *supra* note 3, at 7–11.

75. *POLITICS*, *op. cit.*, Book 1, Ch. 8, Lines 15–22.

76. Personal communication with Martha C. Nussbaum (Mar. 5, 2020) (on file with author); Heather Battalay, *Epistemic Self Indulgence*, *METAPHILOSOPHY*, Vol 41 (2010) (detailed discussion of this argument).

77. Stanford Encyclopedia of Philosophy (June 2015) available at <https://perma.cc/3JFW-TTUW>.

78. *Id.*

79. *Id.*

80. *Id.*

81. Ilea, *supra* note 3.

animals do suffer and feel pain and deserve to be treated well.⁸² Immanuel Kant took a more middle-ground view on the moral status of non-human animals. He argued while they do not have inherent value, hurting them hurts humanity, and being kind to them benefits humanity.⁸³

All of this historical reasoning has led over time to three modern arguments to extending legal protections from mere welfare measures to some form of equitable rights akin to those that many humans have today. These arguments include: (1) the rationale of suffering; (2) the rationale of autonomy; and (3) application of capabilities approach. We will look at each of these briefly before moving into their application to a right of ethical consideration for all animals.

B. Modern Foundations.

1. *The Rationale of Suffering.*

With respect to theoretical arguments for animal rights, the rationale of suffering, pioneered by the utilitarian Jeremy Bentham, has led the way.⁸⁴ Bentham “famously” held that the only salient ethical facts for us to understand are the presence of pleasure and pain.⁸⁵ Accordingly, ethics is “the art of directing man’s actions to the production of the greatest possible quantity of happiness, on part of those whose interest is in view.”⁸⁶ Importantly, Bentham did not feel constrained by the “conventional Judeo-Christian views” of his time regarding animals.⁸⁷ Instead, he recognized that humans can direct their own actions or others, including “animals, which on their own account of their interests having been neglected by the insensibility of the ancient jurists, stand degraded into the class of things.”⁸⁸ Bentham’s interest in reducing suffering and increasing pleasure, and not on some notion of intelligence or reasoning, was clearly the basis for his advocacy for animals. As he described it, “the question is not, [c]an they reason? Nor, can they talk? but, [c]an they suffer?”⁸⁹

We now believe that Bentham’s animal advocacy was not a mere part of his larger repudiation of British attitudes that underlay Victorian views

82. Ilea, *supra* note 3.

83. Ilea, *supra* note 3; but see generally CHRISTINE KORGAARD, *FELLOW CREATURES* (Oxford University Press, 2018) (acknowledging that Kant’s own views on animals are narrow, but using Kantian material to construct a powerful narrative of animal ethics).

84. Nussbaum, *supra* note 30, at 617.

85. See *id.*

86. JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 143 (Hafner Press 2007).

87. NUSSBAUM-WICHERT, *supra* note 73, at 266.

88. *Id.* (citing BENTHAM, *supra* note 86, at 144).

89. BENTHAM, *supra* note 86, at 311, n.1.

of the human-animal divide. Instead, it appears to be a genuine interest in animals, and their suffering. As Rachel Nussbaum-Wichert and Martha C. Nussbaum explain:

But the interest of animals was very genuine: numerous remarks of Bentham himself and his devoted editor John Bowring testified to his fondness for wide range of animals, including cats, donkeys, pigs, and mice. He cultivated a friendship with a pig who used to follow him around on walks. A cat he named Reverend John Langborn used to eat macaroni at the table with him. He loved to have mice play in his study and eat crumbs from his lap. "I love everything that has four legs," he wrote. He used to call with dismay the cruelties that he himself had inflicted on animals as a child, and the salutary effect that his uncle's reproaches had on him.⁹⁰

While Bentham's views would not be considered radical today—while he rejected hunting and fishing for sport, he did not oppose the ethical eating of animals⁹¹—it was certainly radical for his day. As Gary Francione explains, "Bentham's position marked a sharp departure from a cultural tradition that had never before regarded animals as other than things to avoid morally significant interests . . . For Bentham, our treatment of animals matters because of its effect on beings that can suffer, and our duties are owed directly to them."⁹² Most importantly, Bentham's work inspired many early animal welfare acts,⁹³ and continues to be the basis for many modern arguments for animal rights and elimination of the animals as property paradigm.⁹⁴

2. The Rationale of Intelligence.

John Stuart Mill, seeking to expand upon Bentham's focus on hedonism, provided, albeit unintendedly, a new rationale for the granting of rights to non-human animals—intelligence. Mill believed that Bentham's focus on pleasure was too simplistic. Mill believed that pleasures differ in quality as well as quantity and believed that mental pleasures were superior to pleasures of the body.⁹⁵ Mill did not appear to have the same affection for animals, however. He generally believed that animals lacked the capacity to experience the "higher" mental pleasures,

90. NUSSBAUM-WICHERT, *supra* note 73, at 267.

91. *Id.* at 14.

92. GARY L. FRANCIONE, ANIMALS: PROPERTY OR PERSONS? ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 113 (Sunstein, C.R. and Nussbaum, M.C., eds. Oxford University Press 1993).

93. *Id.*

94. See, e.g., PETER SINGER, ANIMAL LIBERATION 7 (Harper 1975).

95. JOHN STUART MILL, UTILITARIANISM, UTILITARIANISM AND OTHER ESSAYS 279 (Alan Ryan ed., 1987).

which were reserved (in line with the Victorian views of his time) for humans.⁹⁶

Mill ignores, however, the views of possibly Pythagoras and certainly Aristotle that animals of many types exhibit intelligence and cognitive capacity. Even if we attribute his view to a legitimate disagreement on the issue, he is certainly refuted by modern science. As Rachel Nussbaum-Wichert and Martha Nussbaum have observed, “a flood of new research on the cognitive capacities of animals has made Aristotle’s insights impossible to deny.”⁹⁷ Just to mention the more well-known cases today, it is widely known that the great apes, whales, and dolphins (among others) demonstrate extremely high intelligence.⁹⁸ These animals exhibit “resourceful goal-directed behaviors,” forms of language, and “complex forms of socially learned interactions amounting to culture.”⁹⁹

Today, the rationale of intelligence is at the heart of a legal strategy, closely associated with attorney Steven A. Wise, to emancipate captive animals like chimpanzees and elephants in the United States.¹⁰⁰ In both his 2001 book, *Rattling the Case: Toward Legal Rights for Animals*,¹⁰¹ and in a 2016 documentary film about his work,¹⁰² Wise argues that certain animals possess such similarities to human beings that negate any basis for treating them differently than humans in the eyes of the law. As Martha C. Nussbaum describes his work:

They are, he says, self-conscious, they are self-directing, they have a theory of mind, they have culture, they are not ‘cabined by instinct,’ they are able to contemplate their own future. In general, they are ‘really, really smart.’ Centrally, he holds that they are ‘autonomous creatures’ who, for that reason, should have ‘autonomous lives.’¹⁰³

In making these observations, Wise intends to show us that the line we have drawn between humans and non-human animals is “irrational and needs rethinking.”¹⁰⁴ He does this through a series of well-thought-out

96. NUSSBAUM-WICHERT, *supra* note 73, at 271.

97. *Id.*

98. See, e.g., *id.* at 21; see also Dina Spector, *The Smartest Animals in the World*, BUSINESS INSIDER (Apr. 23, 2014), <https://perma.cc/HM2D-FCN5>.

99. *Id.*; see also *infra* Part III.C.

100. See Bryant, *supra* note 4, at 258.

101. See generally, STEVEN A. WISE, *RATTLING THE CASE: TOWARD LEGAL RIGHTS FOR ANIMALS* (Perseus Publishing, 1st ed. 2000).

102. *Unlocking the Cage* (HBO Documentary Films, Pennebaker Hegedus Films 2016).

103. Nussbaum, *supra* note 30, at 3.

104. *Id.* at 4.

pieces of visual evidence that at their core other species can undertake human-like activities, from using language to showing emotions.¹⁰⁵ In this sense, his work is designed to play off of our own desire to see human attributes in certain non-human animals.

Wise's work has been very important in the field of legal rights for non-human animals, and certainly represents the forefront of the "personhood" movement for some animal species.¹⁰⁶ At the core of the personhood movement is the belief that since the law gives legal personhood to corporations, municipalities, and ships, it is immoral to deprive the same liberty rights to certain animals.¹⁰⁷ As Judge Fahey of the New York Court of Appeals puts it:

Does an intelligent nonhuman animal who thinks and plans and appreciates life as human beings do have the right to the protection of the law against arbitrary cruelties and enforced detentions visited on him or her? This is not merely a definitional question, but the deep dilemma of the ethics and policy that demands our attention. To treat a chimpanzee as if he or she had no right to liberty protected by habeas corpus is to regard the chimpanzee as entirely lacking independent worth, as a mere resource for human use, a thing the value of which consists exclusively in its usefulness to others. Instead, we should consider whether a chimpanzee is an individual with inherent value who has the right to be treated with respect.¹⁰⁸

Unfortunately, it can be said that Wise's work has often over-accentuated autonomy as the foundation for non-human legal rights.¹⁰⁹ This has left him vulnerable to other aspects of granting legal status to non-human rights that need to be answered. For example, he has failed to

105. Nussbaum, *supra* note 30, at 6.

106. See *Matter of Nonhuman Rights Project, Inc. v. Lavery*, 31 N.Y.3d 1054 (2018) (habeas corpus proceedings on behalf of Tommy and Kiko, two captive chimpanzees); *Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc.*, 192 Conn. App. 36 (2019) (writ of habeas corpus on behalf of three elephants being held captive). Another interesting personhood case is *Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entertainment, Inc.*, 842 F. Supp. 2d 1259 (S.D. Cal. 2012), which sought declaratory and injunctive relief for being held by SeaWorld in violation of slavery and involuntary servitude provisions of the Thirteenth Amendment to the U.S. Constitution.

107. See Angela Fernandez, *Legal History and Rights for Nonhuman Animals: An Interview with Steven M. Wise*, 41 DALHOUSIE L.J. 197, 202–203 (2017); see also Will Kymlicka, *Social Membership: Animal Law Beyond the Property/Personhood Impasse*, 40 DALHOUSIE L.J. 123, 130–34 (2017) (general discussion of personhood).

108. *Matter of Nonhuman Rights Project, Inc. v. Lavery*, 31 N.Y.3d 1054, 1058 (2018).

109. See, e.g., Nussbaum, *supra* note 30, at 3–4.

account for more utilitarian arguments for defining personhood. While a court might be willing to accept and appreciate that a chimpanzee, for instance, is self-aware and intelligent, the legal retort is that such an animal is still not a person because it lacks the “capacity or ability . . . to bear legal duties, or be held legally accountable for [its] actions.”¹¹⁰ Thus, the argument goes, a corporation can be counted on to pay taxes and follow the law, thus making it worthy of the privileges personhood bestows on it under our legal system.

Similarly, Wise’s arguments don’t provide an adequate explanation regarding what remedy should be available for an emancipated animal. While he has made a compelling argument that some non-human animals deserve more control over their lives, he has also argued that chimpanzees are at the level of a 5-year old human child.¹¹¹ And while no one would argue that a 5-year old should not have some right of self-control, we certainly would not set the child free. Instead, his position suggests he is not arguing for actual legal rights, but instead for a new system of welfare restrictions imposed on the animal’s guardian.

Finally, he has not adequately explained how his legal theory sets a usable precedent for considering similar legal claims by other animals in the future. On one hand, he acknowledges his work is “the first salvo” in a strategic war.¹¹² This strongly suggests he sees his cases as a first step toward establishing rights for a broader range of species.¹¹³ On the other hand, his focus on autonomy seems to validate the old idea of a *scala naturae* with us at the top. In other words, after our dominance, some animals might get more legal protections because they are like us; others, perhaps less intelligent, will not. Martha C. Nussbaum has argued that such thinking is not “just intellectually lazy and complacent,” but also potentially “dangerous.”¹¹⁴ Among other things, she notes it leads us to focus on “artificial performances” that may not be characteristic of the life a species actually lives in the wild.¹¹⁵ Thus, she has recently worked to apply her version of the Capabilities Approach to animals, arguing it is more inclusive and respectful of the diversity of animal lives.

110. *Matter of Nonhuman Rights Project, Inc.*, 152 A.D.3d at 78.

111. See Nussbaum, *supra* note 30, at 3.

112. *Id.* at 6.

113. See Greg Norman, *Fresh Off Seaworld Victory, Animal Rights Groups Take Aim at Zoos, Circuses And Maybe Your Pet*, FOX NEWS (Apr. 26, 2016), <https://perma.cc/VBQ9YLUF> (opponents of animal rights certainly think it is a slippery slope).

114. See Nussbaum, *supra* note 30, at 17.

115. *Id.* at 9.

3. The Capabilities Approach

The Capabilities Approach was developed with only the human case in mind. According to the Stanford Encyclopedia of Philosophy:

The capability approach is a theoretical framework that entails two core normative claims: first, the claim that the freedom to achieve well-being is of primary moral importance, and second, that freedom to achieve well-being is to be understood in terms of people's capabilities, that is, their real opportunities to do and be what they have reason to value. The approach has been developed in a variety of more specific normative theories, such as (partial) theories of social justice or accounts of development ethics.¹¹⁶

The Capabilities Approach argues that in looking at how well a group of humans is doing the focus should not be on average utility.¹¹⁷ Rather, the right question to ask is, 'How well are the individuals able to do and be in areas important to their lives?'¹¹⁸ The answer to that question is the account of that individual's capabilities.¹¹⁹

Martha C. Nussbaum has developed a version of the Capabilities Approach that creates a partial approach to basic social justice and human rights.¹²⁰ She has developed a list of ten capabilities that she argues must be secured up to a minimum level for individuals within the group for that group to have any claim to justice: Life; Bodily Health; Bodily Integrity; Senses, Imagination and Thought; Emotions; Practical Reason; Affiliation; Connection to Other Species; Play; and Control Over One's Environment.¹²¹

Turning to animals, Nussbaum has argued that dignity is not just a human right but belongs to other animals as well. In her view, "all are worthy of lives commensurate with the many types of dignity inherent in their own forms of life. All animals, in short, should have a shot at flourishing in their own way."¹²² Most importantly, and what sets her approach apart from others, she recognizes that:

116. The Capability Approach, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Oct. 3, 2016) <https://perma.cc/5G7A-TBFJ>.

117. AMARTYA SEN, PREFACE TO COMMODITIES AND COMMONALITIES PREFACE (Oxford University Press, 1999) (1987).

118. *Id.*

119. *Id.*

120. MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 4 (Cambridge University Press, 2000).

121. Nussbaum, *supra* note 117, at 78–80.

122. *Id.* at 17.

“[each] creature [] deserves ethical consideration for what it is, and a kind of constitution that specifies what harms it should not be permitted to suffer—not in terms of its likeness to humans or its possession of some least-common-denominator property—but in terms of what it is itself, the form of life it leads.”¹²³

In other words, capabilities are species-specific.

In this regard, while recognizing that even some of the ten “human” basic capabilities she has identified might apply to some non-human species,¹²⁴ she advocates for similar lists of capabilities for other animals. While not providing such lists, she does provide us with a number of questions to consider:

What life span is normal for that species in the wild? What is the physical condition of the healthy animal? What human [or non-human] acts invade or impair the bodily integrity of that sort of animal? What types of movement from place to place are normal and more pleasurable for that sort of animal? What sensory and imaginative stimulation does this animal seek, and what is it to keep the animal in an unacceptably deficient sensory environment? What is it for this sort of animal to live in a crippling and intolerable fear or depression, or with a lack of bonds of concern? What type of affiliations does this animal seek in the wild, what sorts of groups, both reproductive and social, does it form? What types of communication does the animal engage in, using what sensory modalities? What is it for the animal to be humiliated and disrespected? What is it for the animal to play and enjoy itself? Does the animal have meaningful relationships with other species and the world of nature? What type of objects does the animal use and need to control if it is to live its life?¹²⁵

Nussbaum does not purport to answer these questions for each species, or to determine how species-specific capabilities should be addressed by the law.¹²⁶ These are questions that beg for a system that can be applied by compassionate conservationists and animal rights advocates in the future. A system like the right of ethical consideration, to which I now turn.

123. Nussbaum, *supra* note 117, at 18–19.

124. *Id.* at 17. For example, she points to connection with other species and practical reason. For reasons discussed below, I would argue that for some species there is also overlap with bodily health, bodily integrity, sense, imagination and thought, emotions, affiliation, and certainly play.

125. *Id.* at 18.

126. *Id.* at 19.

III. A Right of Ethical Consideration for All Animals “All Life Is Holy:”¹²⁷ The Need for Humans to Re-Communion with other Sentient Creatures.

According to Nalungiaq, a Netsilik Inuit, “[i]n the very earliest time, when both people and animals lived on earth, a person could become an animal if he wanted to and an animal could become a human being. Sometimes they were people, and sometimes animals and there was no difference. All spoke the same language.”¹²⁸ This passage should serve to remind us of that intuitive feeling that there is a profound connection between the human mind and the natural world. Indeed, we share DNA with every creature that ever walked, crawled, flew, or swam on the Earth.¹²⁹ Building in complexity over billions of years, human DNA today not only contains our species and individual traits, but also the seed for the intuitive senses that all life needs to survive.¹³⁰ For humans, and likely for many other species on the planet, when properly nurtured, these senses appear designed to favor, among other things, “living in peace with [the] world,” not as masters over other living things, but as guests among others.¹³¹ As the late Professor Paul Shepard explains:

For the infant as person to be, the shape of all otherness grows out of that maternal relationship. Yet the setting of that relationship was, in the evolution of humankind, a surround of living plants, rich in texture, smell, and motion, the unfiltered, unpolluted air, the flicker of wild birds, real sunshine and rain, mud to be tasted and tree bark to grasp, the sounds of winds and water, the voices of animals and insects and humans—all of these are not vague and pleasant amenities for the infant, but the stuff which is second grounding, even while in its mother’s arms, has begun.¹³²

127. SURVEYING THE LITERARY LANDSCAPES OF TERRY TEMPEST WILLIAMS 129 (Katherine R. Chandler, et al. eds., 2008).

128. RUTH FINNEGAN, SYMPOSIUM OF THE WHOLE: A RANGE OF DISCOURSE TOWARD AN ETHNOPOETICS 3 (Jerome Rothenberg et al. eds., 1983).

129. Ker Than, *All Species Evolved From a Single Cell, Study Finds*, NATIONAL GEOGRAPHIC (May 14, 2010), <https://perma.cc/ZV5F-GKGP>.

130. See, e.g., PAUL SHEPARD, NATURE AND MADNESS 6 (Athens: University of Georgia Press, 1982) (recognizing that the “seed of normal ontogeny is present in all of us”).

131. *Id.*

132. *Id.* at 7.

Some indigenous cultures, and more holistic religions, like Buddhism and Hinduism, have retained these beliefs and way of life.¹³³ Elsewhere, particularly in what is called the West, so-called civilized cultures have largely abandoned the “ceremonies” of infant nurturing aimed at affirming “the metaphoric, mysterious, and poetic qualities of nature” already fixed in our body and mind through evolution.¹³⁴

An early, yet often unexamined acknowledgement of the dissolution of human union with nature and other animals is found in the intricate writings of Alain de Lille (or Alan of Lille), a French theologian and poet born near the end of the dark ages.¹³⁵ One scholar who has dissected these writings, Wendell Berry, recounts Alan’s telling of his dream-vision conversing with Nature, whom he recognizes both as his “kinswoman” and as the Vicar of God.¹³⁶ In his interpretation of Alan’s work (*De planctu Naturae* (*On the Complaint of Nature*), Berry states that through his vision, Alan is told by Nature (his “great instructor”) that: the integrity of the natural world depends on the maintenance by humans of their integrity by practice of the virtues. The integrities are interdependent. They cannot be separated and they must not be separately thought about.¹³⁷

Berry notes that these virtues—which were defined by Alan to include the practice of chastity, temperance, generosity, and humility¹³⁸—are certainly high standards that have not been met by the humans of the industrial age.¹³⁹ But perhaps more importantly, it appears that the point of Alan’s “vision” is that they were already not being properly practiced by humans in his time, with a very grave outcome for the relationship between humans and the non-human world, including other animals. According to Berry, in Alan’s mind, our abstention from the virtues severed our intuitive link with Nature. As he puts it:

Intuition tells us, and has told maybe as long as we have been human, that the nature of the world is a great being, the one being used in which all other beings, living and not living our joy. And

133. See Annie Sneed, *What Conservation Efforts can Learn from Indigenous Communities*, SCIENTIFIC AMERICAN (May 29, 2019), <https://perma.cc/DLM9-2KRU>; Priscilla Tay, *Can Religion Teach Us to Protect Our Environment? Analyzing the Case of Hinduism*, ETHICS & INTERNATIONAL AFFAIRS (Apr. 2019), <https://perma.cc/C4PX-Y6K2>. For an in-depth examination of the rule of nature within Buddhism and Hinduism, see Rhyddhi Chakraborty, *Insight of Hinduism and Buddhism: A Study of the Possible Remedies for Deep Ecological Problems* (Aug. 2015).

134. SHEPARD *supra* note 130, at 5–7.

135. WENDELL BERRY, *The Presence of Nature in the Natural World: A Long Conversation*, A SMALL PORCH 83–90 (Counterpoint 2016).

136. *Id.* at 83.

137. *Id.* at 86.

138. *Id.* at 84.

139. *Id.* at 86.

for his longest time, in our tradition, we have called this being “Natura,” or “Kind” or “Nature.” And if we forget, our language remembers for us the relation of “natural” (by the way of “kind”) to “kindness” and “kin,” and to “natal,” “native,” nativity,” and “nation.” Moreover, as understood by Alan of Lille and the poets who descend from him, the being and the name of “Nature” also implicates the history of human responsibility towards the being of all things, in nature’s continuing requirement about responsibility.¹⁴⁰

Simply put, whether found in Alan’s vision, the stories of indigenous peoples, or in centuries of philosophical and spiritual wittings, there is the ability for tenderness in us toward the most vulnerable animals among us. Whether or not tied to the non-practice of virtues, many modern cultures have turned away from this aspect of our being, having created a social norm where love and compassion are attributes that we habitually claim, but mostly fail to practice. Again, as Paul Shepard tells us, from a standpoint of human evolution (both biological and, relatedly, culturally), many humans today are simply deprived from becoming the mature individuals we should be in order to “handle our responsibilities to things wild.”¹⁴¹ Of course, given our ties to life on this planet, both through genetics, and more recently a shared history, “there is a secret person undamaged in each of us.”¹⁴² If we could once again properly nourish that secret soul, perhaps we can then re-communion with other life on Earth.

Thus, a right of ethical consideration is an approach for us to again become conscious of the undeniable connection between us and all living things. It requires us to not only ask what it means for other animals to live a meaningful life, but also for us to offer up for examination how our proposed, future decisions might impact those lives. Time and time again, those who have seriously examined these questions objectively, and with an open heart, have come to similar conclusions, namely, that our “assumption of separation and even superiority is just that.”¹⁴³ But it’s not enough to have an occasional thinker reach such a moral position. We need a broader effort to create the collective human will to turn an intangible moral conviction into an operable code that requires animals be given the

140. BERRY, *supra* note 135, at 89–90. Interesting, the practice of virtues remains at the heart of other cultures and religions that have retained their connection with nature and other animals. *See, e.g.*, NICHOLAS F. GIER, *DHARMA MORALITY AS VIRTUE ETHICS, INDIAN ETHICS* (Purusottama Bilimoria et al. eds., Springer, 2009).

141. Keith Schneider, *Nature and Madness* (reviewing PAUL SHEPARD, *NATURE AND MADNESS* (Athens: University of Georgia Press, 1982)) <https://perma.cc/YD8R7AE9>.

142. SHEPARD, *supra* note 130, at 129.

143. Marc Bekoff, *How to Make the World Better for Nonhuman Animals*, *PSYCHOLOGY TODAY* (Dec. 17, 2017) <https://perma.cc/479Q-SKH6> (quote by Howard Garrett of the Orca Network).

appropriate level of respect and dignity in our societal decision-making processes.

Unfortunately, left unaided, it has proven very difficult for us to establish such an ethic, let alone regain that instinctive connection to the natural world. We have established hardened institutional lines—religious, economic, cultural, and legal—between the human and other world. Those who benefit from the status quo will certainly do their best to discourage any attempt to rekindle our moral connections, and responsibility, to non-human animals and the environment. But the truth is the more we learn about those connections, and about the lives of others, the more we tend to see that those institutional lines are barriers to a better world for all of us. In other words, the more we can engage in methodical, shared ethical consideration of other animals, the more likely we will be to change our harmful behavior towards others and perhaps someday even grant specific, yet appropriate, rights to non-human animals.

In my mind, such an effort requires collaboration of three disciplines, philosophy (and in particular the Capabilities Approach), science, and law to help us determine, perhaps on a case-by-case base, what an animal needs to live a meaningful life. Each of these disciplines offers an important foundation for a right of ethical consideration, all of which are necessary to change our social attitudes toward non-human animals. Let us consider the significance of each.

B. The First Tier of a Right of Ethical Consideration: Philosophical Conviction.

Perhaps the work of the Philadelphia Quaker William Bartram, one of America's most influential naturalists of the late eighteenth and early nineteenth centuries, best illustrates the importance of philosophy for a modern right of ethical consideration. Bartram proposes that human behavior points to the existence of a faculty of reason, and that one function of reason is moral awareness.¹⁴⁴ He further offers us the following, "what is ethically appropriate for one rational agent is appropriate for all rational agents."¹⁴⁵ In other words, humans have an obligation "to promote the flourishing of other" in our moral community, which would include all sentient actors, human and non-human alike.¹⁴⁶ Humans, of course, are (so far) the only mega-rational animal capable of making moral choices regarding the lives of other living things.

144. See Kerry S. Walters, *The "Peaceable Disposition" of Animals: William Bartram on the Moral Sensibility of Brute Creation*, 56 PENNSYLVANIA HISTORY 157, 168 (July 1989).

145. *Id.*

146. *Id.*

This supposition is again echoed nearly a century and half later in the works of semioethicists, like John Deely and Morten Tønnessen. Here the belief is that all living things are semiosic.¹⁴⁷ That is, all living things contribute meaningfully to dynamic systems of signification within their environments.¹⁴⁸ Deely has in particular emphasized a distinction between those living beings with moral standing in their environment, and the uniquely human domain of moral agents (capable of moral evaluation). What matters then are ethical obligations. In his words, “[h]uman animals not only are unique in having responsibilities, but also in the extent of those responsibilities: for we have learned through and on the basis of semiosis become ‘metasemiosis’ or semiotics that our interactions involve us in the whole of Gaia, not just the human socio-cultural sphere.”¹⁴⁹ Accordingly, for Deely, “semioethics . . . springs from the discovery that the human being has responsibility that goes beyond the human world.”¹⁵⁰

Of course, the question remains, with respect to the non-human animal world, or what Bartram would call *brute creation*, as to whether other animals are actually similarly endowed with rationality, and, thus, entitled to “the same right of ethical consideration as other members of the moral community?”¹⁵¹ Semioethicists could certainly make the case that participation by a living thing in a system of signs alone demonstrates, as suggested by John Locke, a life of reason and logic (rationality).¹⁵² Or, from Bartram’s perspective, we can appeal to “those actions and movements of animals which they have in common with us.”¹⁵³ Finding little difference between such actions, “why, then, have we not every reason to believe that those actions and movements are excited and proceed from the same [rational] motives or cause?”¹⁵⁴

Thus, on one hand, even without scientific inquiry, animals appear to “behave in purposeful, creative ways,” and are capable of activities displaying utility, beauty and orderliness.¹⁵⁵ In line with Nussbaum’s view of the Capabilities Approach, while each species might have a unique set

147. See, e.g., Jonathan Beever & Morten Tønnessen, *Justifying Moral Standing by Biosemiotic Particularism*, 37 SEMIOTIK 31, 32 (2015).

148. *Id.*

149. *Id.* at 34.

150. *Tell me, where is morality bred? The Semioethics Interviews I: John Deely*, 4 HORTUS SEMIOTICUS (2009), available at <https://perma.cc/HVD9-SX5R>.

151. Walters, *supra* note 144, at 168.

152. THE WORKS OF JOHN LOCKE. A NEW EDITION, CORRECTED. IN TEN VOLUMES, 4 at 175 (London 1963) (Thirdly, the third branch [of sciences] may be termed σημειωτική [*Semeiotike*], or the doctrine of signs, the most usual whereof being words, it is aptly enough termed also Λογική, logic; the business whereof is to consider the nature of signs the mind makes use of for the understanding of things, or conveying its knowledge to others.).

153. *Id.*

154. *Id.*

155. *Id.* at 169.

of capabilities, animals, when examined, demonstrate certain functions that, when allowed to be exercised, contribute to their well-being (and presumably a happier life). After centuries of debate, today we can assert with philosophical conviction that non-human animals possess such capabilities, and that they therefore deserve some level of ethical consideration. I do believe, however, that philosophy alone does not compel a basic right of ethical consideration. But it does establish a moral basis requiring us to make a scientific inquiry into what animals need to live meaningful lives, and how human actions facilitate or impede the capabilities of others. So, let us look at the second tier, scientific imagination.

C.The Second Tier of a Right of Ethical Consideration: Scientific Imagination.

Today, it would be almost unimaginable for the family doctor, when asked to consider our overall health and well-being, to simply poke and prod us physically, while completely ignoring our emotional and mental health. We are holistic beings—physical ailments can affect our mental fitness and mental stressors can make us physically ill.¹⁵⁶ Yet, less than a century ago, from a medical profession standpoint, this was not the norm. Many medical doctors were, by in large, only interested in examining and treating the physical manifestations of our well-being. Can the problem be diagnosed and treated through physical examination? Can it be cut out of us or treated with medication? These questions were within the province of the doctor. The problems of the head and heart—mental and emotional well-being—were left for the “softer-side” of science, like psychology.¹⁵⁷

We are currently emerging from a similar age of denialism in animal science. For the longest time, science has depicted animals as “stimulus-

156. *Mental Illness*, Mayo Clinic (last visited Sept. 26, 2020), <https://perma.cc/H47A-G4HN> (the field of medicine now recognizes the intimate link between a person’s mental state and their physical health. People who have chronic illnesses such as diabetes, heart disease, or rheumatoid arthritis commonly develop depression. Similarly, people with depression can often develop physical symptoms such as back pain, headaches, and fatigue); *Chronic Illness and Mental Health*, National Institute of Mental Health (last visited Sept. 26, 2020), <https://perma.cc/NJW9-ELJ7>.

157. While on one hand doctors largely ignored aspects of patient’s emotional well-being, any attention toward mental states focused on alleged physical bases. Lobotomies were conducted as late as the 1980s in America to deal with mental illness. Health Psychology has emerged as a field in the last thirty or so years, and doctors recognize that many problems with physical symptoms are not somatic in nature. See, e.g., Luigi Solano et al., *The family physician and the psychologist in the office together*, 6 MENT. HEALTH FAM. MED. 91 (2009); Heather Stringer, *Training physicians to see psychology in medicine*, 50 AM. PSYCHOL. ASS’N 60 (Mar. 2019).

response machines while declaring their inner lives barren.”¹⁵⁸ As James C. Ha and Tracy L. Campion, recently described it:

In the not so distant past, the idea that animals were capable of feeling “emotions” was unorthodox, at best, and blasphemous, at worst, and ethologists have long struggled with conflicting schools of thought. While Darwin was one of the first scientists to write about the emotional lives of nonhuman animals, most early scientists and philosophers (and philosopher-scientists) were animal emotion denialists, and none of them more so than Rene Descartes. Descartes postulated that animals were “automata,” beings that behaved in ways that gave the false appearance of emotion and consciousness, but who were, in fact, merely mechanistic. But in the centuries since the “dark ages” of animal science, new hypotheses have been presented, suggesting that there’s not only ample scientific evidence of emotion in animals that are seen as “complex” and “charismatic,” such as dolphins, nonhuman apes, elephants, and dogs, but even among insects, who have some of the most simplistic neural circuitry.¹⁵⁹

Thus, for a large part of the two centuries, animal sciences were rooted in biology. This was true even for ethology, the study of animal behavior, which long considered animal behavior to be an evolutionarily adaptive trait.¹⁶⁰ At best, psychologists believed such behavior could be influenced by associative learning, but there was certainly no such thing as animal cognition and emotion.¹⁶¹

Today, however, this is changing. While we cannot be 100% sure what human or non-human animals actually feel, the “weight of the evidence from evolutionary biology and large bodies of detailed comparative evidence, together with grounded common sense, all indicate with high probability that animals with nervous systems are indeed sentient, meaning that they feel.”¹⁶² Of course, this is also what philosophers were

158. Frans de Waal, *Your Dog Feels as Guilty as She Looks*, N.Y. TIMES (Mar. 8, 2019), <https://perma.cc/TM9K-HLDD>.

159. See generally James C. Ha & Tracy L. Campion, *The Emotional Animal: Using the Science Of Emotions to Interpret Behavior*, DOG BEHAVIOR (Academic Press 2019).

160. Definition of *ethology*, MERRIAM-WEBSTER, <https://perma.cc/S5LL-BSVL> (last visited Sept. 26, 2020).

161. Leviton, *supra* note 17, at 7; Wall, *supra* note 158, at 7 (Indeed, as Frans de Waal explains, “It wasn’t until the 1990s that we finally started to win the battle with the behaviorists, and those that talked about animal cognition got a foothold and got funding for experiments”).

162. Marc Bekoff & Jessica Pierce, *Animal welfare cannot adequately protect nonhuman animals: The need for a science of animal well-being*, 1 ANIMAL SENTIENCE 7(2) (2016).

telling us long ago, what Darwin seemed to believe¹⁶³ and what Bartram concluded through his own powers of observation.¹⁶⁴ In short, other animals display emotions, invent, act purposefully, teach, learn, and adapt.

What is currently happening is what Dr. Marc Bekoff calls “naturalizing the study of animal emotions.”¹⁶⁵ Bekoff and his colleague Jessica Pierce call this emerging scientific change “compassionate conservation.”¹⁶⁶

Scientific research that helps us understand the lives of wild animals is vitally important, as are the intentional conservation efforts to protect them. The science of animal well-being challenges us to explore ways in which we can be less selfish and violent in our relationships with animals. It focuses attention on individual animals themselves and what they need and want, not just what we need and want. It seeks first and foremost to avoid harming animals, and encourages creative thinking about how to protect the integrity and freedom of animals.¹⁶⁷

Compassionate conservation proposes that conservation ethics should consider animals as individuals, not just members of populations of species.¹⁶⁸ It means using empathy for non-human animals and striving to reduce the harm we humans can cause to them.¹⁶⁹ But the real gift compassionate conservationism gives us is the license for science to be more imaginative. Researchers are rapidly gathering ample evidence, and new data is constantly accumulating, to support arguments that many, if not all, animals have deep, rich, and complex emotional lives.¹⁷⁰ One only needs to tune into both the popular media and scientific news outlets to see these advancements in the headlines on a near weekly basis.¹⁷¹ For those who pay attention, the discoveries are truly startling. It is not just the elephants, whales, dolphins and apes of our world that make news about their cognitive, social and emotional lives. The list also includes all types of birds, mammals, insects, and fish species. Perhaps most importantly, with the door open to the study of the meaningful lives of animals, the field

163. CHARLES DARWIN, *THE EXPRESSION OF THE EMOTIONS IN MAN AND ANIMALS* 73, 100 (Cambridge Univ. Press 2009).

164. Walters, *supra* note 144, at 170–71.

165. Marc Bekoff, *Animal Emotions: Exploring Passionate Natures* 50 *BIOSCIENCE* 861, 861 (2000).

166. *Id.*

167. MARC BEKOFF & JESSICA PIERCE, *THE ANIMALS’ AGENDA: FREEDOM, COMPASSION AND COEXISTENCE IN THE HUMAN AGE* 164 (Beacon Press, 2017).

168. Vanessa Souza Soriano et al., *Compassionate Conservation: Concept and Applications*, 22 *ARCHIVES OF VETERINARY SCIENCE* 116, 118 (2017).

169. *Id.*

170. Bekoff, *supra* note 165, at 862.

171. See, e.g., Bekoff & Pierce, *supra* note 166, at 1–2.

of study is expanding to include more traditional, “hard” sciences, like neurobiology.¹⁷²

Today we live in a world where animal science is no longer bound exclusively to the principles of physiology. Scientists are instead encouraged to “pay closer attention to anecdotes along with empirical data and philosophical arguments as heuristics for future research.”¹⁷³ We can combine the “hard” and “soft” interdisciplinary research necessary to advance the study of animal emotions. This gives us the opportunity to begin engaging in the inquiry set forth by Nussbaum,¹⁷⁴ and begin forming a set of species-specific capabilities. Perhaps this coupling of philosophical thought and scientific knowledge can then form the basis for reforming our legal system to better ensure ethical consideration (and perhaps justice) for non-human animals. Let us then turn to the final tier—our system of laws and justice.

D. The Third Tier of a Right of Ethical Consideration: Legal Ingenuity

1. Can the Existing Legal Framework be Used to Advance a Right of Ethical Consideration for Non-human Animals?

Unlike modern philosophical and scientific thinking regarding animal sentience, the law, as it pertains to animals, remains a relic of the unenlightened thinking of the past. We have already seen that our animal welfare laws apply only to a handful of captive animals, and even then, really only seek to minimize physical, and not mental, suffering.¹⁷⁵ For wild animals, the law continues to regard them merely as biological units. Take the Endangered Species Act, for instance, widely considered the jewel

172. In 2012, a prominent group of international cognitive neuroscientists, neuropharmacologists, neurophysiologists, neuroanatomists, and computational neuroscientists gathered at the University of Cambridge and concluded that, “Convergent evidence indicates that non-human animals have the neuroanatomical, neurochemical, and neurophysiological substrates of conscious states along with the capacity to exhibit intentional behaviors. Consequently, the weight of evidence indicates that humans are not unique in possessing the neurological substrates that generate consciousness. Nonhuman animals, including all mammals and birds, and many other creatures, including octopuses, also possess these neurological substrates.” *The Cambridge Declaration on Consciousness* (July 7, 2012), <https://perma.cc/MY9A-LZW6>; see also Jaak Panksepp, *Cross-Species Affective Neuroscience Decoding of the Primal Affective Experiences of Humans and Related Animals*, 6 PLOS One 1 (Sept. 7, 2011).

173. See Bekoff, *supra* note 165, at 863.

174. See Nussbaum, *supra* note 27, at 18.

175. See *supra* Part I. B.

of all wildlife law.¹⁷⁶ The statute itself does not even once use the word “animal,” instead setting forth broad principles of species and habitat conservation to ensure “viable” populations.¹⁷⁷ Not a single federal wildlife statute expressly provides any protection for the social structures, or emotional well-being of any wild animal.¹⁷⁸ This is despite the obvious fact that a viable animal population—one that has the minimum conditions necessary for survival and reproduction—does not in turn mean a happy population, where each animal is able to function within its capabilities.

There are, however, a number of statutes that might serve as an initial point for a new right of ethical consideration. These statutes can be referred to as informational in nature. Some of these laws require that the government disseminate and consider relevant information about the impacts of human activity on the natural world, like the National Environmental Policy Act.¹⁷⁹ Others require that information distributed for commercial purposes be truthful, or at least not intentionally misleading, like false claim acts and consumer right-to-know statutes.¹⁸⁰ Another possible example is cost benefit analysis, which by presidential order has applied for decades to a vast majority of regulations and projects proposed by the federal government.¹⁸¹ Such analysis is a formal technique

176. See, e.g., Michael Bean, *The Endangered Species Act: Science, Policy, and Politics*, 1162 ANNALS OF THE NEW YORK ACADEMY OF SCIENCES 369 (2009); U.S. Dept. of Interior, *10 of the Greatest #WildlifeWin Stories of All Time*, <https://perma.cc/KJN5-HSHP>; Lisa Friedman, *U.S. Significantly Weakens Endangered Species Act*, THE NEW YORK TIMES (Aug. 12, 2019), <https://perma.cc/85SW-H4W4>.

177. 16 U.S.C. §§ 1531–1544. “The purposes of [the ESA] are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species...” *Id.* The ESA requires federal agencies to ensure that actions they authorize are not likely to jeopardize the existence of any listed species, “take” any individual of a listed species, or result in destruction of any habitat of listed species.

178. See Sorano *et al.*, *supra* note 167, at 118–19 (suggesting that the closest any wildlife law may come to going beyond concern for species or population level is the US Marine Mammal Protection Act which basis protections “on individual behavioral characteristics”).

179. 42 U.S.C. §§ 4321 – 4370. NEPA, like the ESA, requires that federal agencies review their proposed actions before making any final decisions. NEPA, however, forces agencies to consider the environment and any significant effects the proposed action may have on the environment. Unlike the ESA, NEPA is less concerned with results than with process: agencies must take a “hard look” at the environmental consequences and, where practicable, mitigate environmental harm.

180. Federal legislation in this category include, *inter alia*, the Federal Trade Commission Act, 15 U.S.C. §§ 41–58, the False Claims Act, 31 U.S.C. §§ 3729–3733, and the Emergency Planning and Right to Know Act, 42 U.S.C. §§ 11001–11050.

181. For a history of cost benefit analysis within the U.S. Executive Branch, see C. Boyden Gray, *The President’s Constitutional Power to Order Cost-Benefit Analysis and Centralized Review of Independent Agency Rulemaking*, MERCATUS WORKING PAPER GEORGE MASON UNIVERSITY (2017).

for comparatively assessing the costs and benefits of an activity or project over a relevant time period.¹⁸² To date, these laws have not been tested appropriately as vehicles to examine how human action affects the social, cultural, emotional, and other capabilities of animals.

Now, the dissemination of truthful information is itself not a substantive protection. Broader knowledge about how our actions specifically affect the meaningful lives of other animals is not going to make life better for the creatures we harm. But the proper use of information in public decision-making processes can lay the foundation for change. The purpose for these information-based laws in the first place is not solely to ensure accurate information, but “a decision-making procedure which emphasizes the process of free and fair deliberation among individuals where their preferences and value orientations are debated with a focus on the need to realize the common good.”¹⁸³ Likewise, requiring accurate information be distributed in public spheres—political and economic—is a means to ensure that individual actors are inclined to make more ethical or reasonable judgments when given the opportunity in a public sphere to reflect about the whole environment as a common good. This is particularly true when the public forum allows others to challenge their potentially narrow, self-interested viewpoints.¹⁸⁴ Finally, we know from experience that as information is disseminated and the impacts of human action on a particular group become increasingly indisputable, our laws often change to provide new substantive protections.

2. Practical Application and Goals of a Legal Right of Ethical Consideration for Non-human Animals.

So, at this point it is probably clear where this is heading. The idea of a right of ethical consideration is to utilize existing informational laws to assemble a larger audience for the philosophical and scientific arguments that human actions can and do have the ability to impact the lives of non-human animals. Of course, it is hoped that along the way careful consideration of particular evidence will result in the avoidance of some human activities that could diminish an animal’s (or animals’) quality of life. But the longer view is that an accumulation of information, even if initially disputed, will transform into a larger societal will that extends legal protections and rights to non-human animals.

182. John L. Moore, J., *Cost-Benefit Analysis: Issues in its Use in Regulation*, ENVIRONMENT AND NATURAL RESOURCES POLICY DIVISION, CONGRESSIONAL RESEARCH SERVICE (June 28, 1995).

183. James Wong, *Debating Environmental Democracy: A Social Choice Theory Perspective* 8 (July 2008) (unpublished conference paper) (on file with author).

184. *Id.*; see also MATHEW HUMPHREY, *ECOLOGICAL POLITICS AND DEMOCRATIC THEORY* 95 (Taylor & Francis, Apr. 26, 2007).

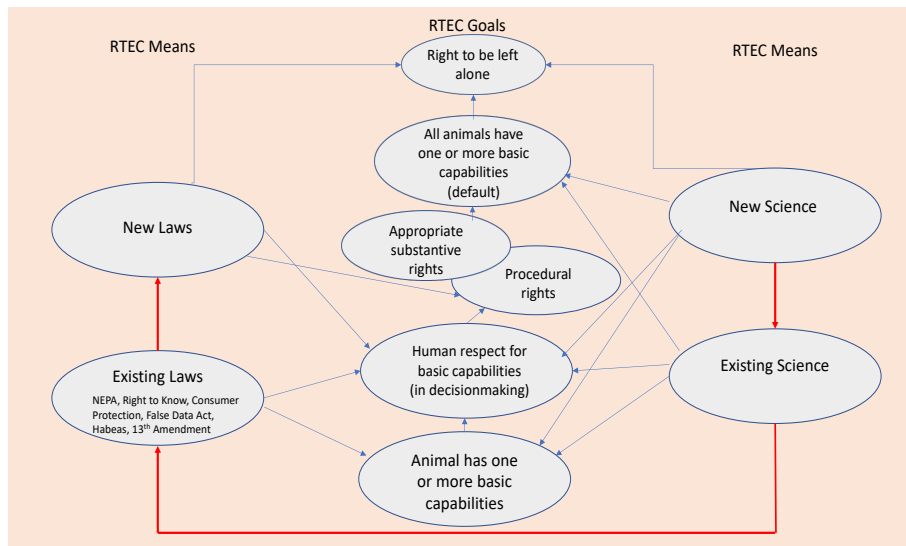


Figure 1

Using Figure 1 above, let's consider the following set of facts to examine how a legal right of ethical consideration might use existing informational laws to address current scientific evidence that a particular species, in this case, elephants, have individual capabilities that are impacted by captivity.

In 2016, three U.S. zoos—the Dallas Zoo, the Sedwick County Zoo in Wichita, and Omaha's Henry Doorly Zoo—sought to import up to eighteen elephants captured from the wild in the Kingdom of Eswatini (formerly Swaziland).¹⁸⁵ The zoos called this proposed import “a rescue mission.”¹⁸⁶ According to the zoos and the Eswatini Big Game Parks authority, the estimated elephant population of thirty-nine elephants in the nation exceeded the parks' carrying capacity.¹⁸⁷ The Eswatini authorities claimed that the elephants had destroyed the vegetation in their compounds, and that it was negatively affecting other species.¹⁸⁸ As such, they asserted that the only options to address the elephant population were to make arrangements for them to be sent to U.S. zoos or to cull them.¹⁸⁹

185. See Siebert, *supra* note 12, at 30–31.

186. *Id.*

187. See Memorandum of Points and Authorities in Support of Motion for a Preliminary Injunction at 8, *Friends of Animals v. Ashe*, No. CV 16-216 (JDB), 2016 WL 10732198 (D.D.C. Feb. 2, 2016), ECF No. 8–1.

188. *Id.*

189. *Id.*

In the process of obtaining necessary permits from the U.S. Fish & Wildlife Service for these imports, the overwhelming view of scientists that commented on the proposal was that when elephants are confined, they nearly always endure severe physical and physiological hardship, especially when they have spent their entire lives in the wild.¹⁹⁰ As sentient animals reliant on family bonds, elephants in zoos display behavioral abnormalities and suffer from increased disease or disability caused by captive environments. Dr. Joyce Poole, a distinguished expert on elephant social behavior and communication, explains it this way:

[Elephants have] renowned memories, intelligence, and sociality of elephants have been documented repeatedly. Similar to those of humans, these traits also make elephants particularly vulnerable to stress and trauma and their long-term consequences. These effects of the proposed importation would have long lasting impacts both for the animals removed from their families and for those remaining. The capture and removal of elephants from their habitats, families and extended social groups is unethical and cruel.¹⁹¹

In other words, elephants are one species that we can easily determine, from both a philosophical basis and a scientific one, have species-specific capabilities.

How do we make a case for a right of ethical consideration for these animals? First, let us consider the use of NEPA or even cost benefit analysis to inject the scientific evidence into the permitting process. The questions to be asked are: (1) Is there valid scientific information available to FWS that would be relevant as to whether any or all of these eighteen elephants might suffer psychological, behavioral, and physical impacts associated with captivity?; (2) If so, does FWS have a legal obligation to adequately consider such information in complying with NEPA?; and (3) with this information adequately considered, does it alter the way we look at the transfer given the costs likely to be born by the elephants?

The answer to the first question is painfully clear: elephants are one of the few species in which the scientific evidence is not only overwhelming,

190. See, e.g., Declaration of Dr. Marion Elizabeth Garai in Support of Motion for a Preliminary Injunction, *Friends of Animals v. Ashe*, No. CV 16-216 (JDB), 2016 WL 10732198 (D.D.C. Feb. 2, 2016), ECF No. 8-4; Declaration of Dr. Phyllis Lee in Support of Motion for a Preliminary Injunction (ECF 8-3), *Friends of Animals v. Ashe*, No. CV 16-216 (JDB), 2016 WL 10732198 (D.D.C. Feb. 2, 2016), ECF No. 8-3; Declaration of Dr. Joyce Poole in Support of Motion for a Preliminary Injunction (ECF 8-2), *Friends of Animals v. Ashe*, No. CV 16-216 (JDB), 2016 WL 10732198 (D.D.C. Feb. 2, 2016), ECF No. 8-2.

191. Poole Declaration, *supra* note 190, at ¶13.

but also uncontested.¹⁹² With regard to the second question, there is ample precedent that NEPA requires disclosure and consideration of this information, even though agencies have largely failed to do so in cases like this one.¹⁹³ This includes scientific evidence that indicates a proposed federal action might injure an animal, whether causing stress to the animals, harassing its social structure, or otherwise causing mental harassment.¹⁹⁴ The third question is more elusive, because it depends heavily on the level of compassion and concern an individual decisionmaker (or any individual asked to consider the question) may have toward elephants and other non-human animals. The real test is whether the addition of this new information has the potential to alter our judgments and beliefs about the ethics of the proposed transfer. Certainly, it might not immediately change the regulatory disposition of the permit. Even so, it seems hard to believe that this exercise—this right of ethical consideration afforded the elephants—lacks potential to raise very strong compassion for these animals that might not otherwise have existed. Compassion not only in the decisionmakers, but the public and others who have the power to alter decisions and legal structures to prevent future human-caused incursions into the lives of elephants.

A second possible use of existing law and science might be the use of consumer protection acts or other laws prohibiting the dissemination of false information about a good, service, or public benefit. Although certainly more controversial, there are many who would assert the zoos, both individually and collectively, not only suppress the relevant scientific evidence regarding the impact of captivity on some animals' social,

192. See Marion Garai, *Statement re the proposed sale and transfer of 18 elephants from Swaziland to three Zoos in the USA*, CONSERVATION ACTION TRUST (Nov. 20, 2015), <https://perma.cc/6EHV-WZLE>.

193. See *Recent Past Pres. Network v. Latschar*, 701 F. Supp. 2d 49, 55 (D.D.C. 2010) (a court must consider whether “the agency has made an adequate compilation of relevant information, has analyzed it reasonably, has not ignored pertinent data, and has made public disclosures”).

194. See, e.g., *Greenpeace U.S.A. v. Evans*, 688 F. Supp. 579, 582–83 (W.D. Wash. 1987) (requiring consideration of the government’s own concern that a proposed research project could result in “harassment on the [killer] whales’ social structure”); *WildEarth Guardian v. Mont. Snowmobile Ass’n*, 790 F.3d 920, 923, 927–28 (9th Cir. 2015) (analyzing an agency decision that acknowledged that snowmobile use in the forest can “stress animals and provoke a flight response during the winter season, when the animals are particularly vulnerable to depletion of their energy reserves” and finding the agency had not adequately addressed the possible harassment on certain “big game” species); *In Def. of Animals v. United States DOI*, 751 F.3d 1054, 1069 (9th Cir. 2014) (reviewing an EA addressing the use of helicopter roundups of wild horses on public lands that described the actions the agency would undertake so the process “would not unnecessarily stress the animals”); *NRDC v. Winter*, 645 F. Supp. 2d 841, 849–51 (C.D. Cal. 2007) (finding that NEPA requires analysis of the effects of sonar to determine the sound level thresholds for “harassment and injury” of whales).

emotional and mental well-being, but actually work to convince the public (and consumer) that the work they are doing is beneficial to the animal and its species.¹⁹⁵ Such acts might be considered a “deceptive commercial practice.” For instance in Kansas, where one of the three zoos is located, the law defines such a practice as “the knowing act, use or employment by any person of any deception, fraud, false pretense, false promise, or misrepresentation of a material fact, with the intent that others shall rely thereon in connection with the sale of any merchandise.”¹⁹⁶ Such acts certainly include false and misleading statements about animals that are being used for a commercial purpose.¹⁹⁷

Of course, a right of ethical consideration is not intended to be a tool to prosecute and punish cruel acts against animals. It ultimately seeks to make tangible changes to legal status of animals to provide adequate protections to their social, emotional, and mental well-being based on the scientific evidence of their species-specific capabilities. Returning to Figure 1, what we are considering so far is merely the recognition of, and some basic level of respect for, elephants’ capabilities in the process that went into deciding to steal them away from their wild African homes. Ultimately, of course, the goal is to support the expanding amount of scientific knowledge about their capabilities with new procedural and substantive rights. A starting point would be enactment of a more specific set of informational-based laws that require consideration of an animal’s physical and mental well-being. This would be something necessary at the federal, state and even local levels to ensure animals receive the broadest consideration. It would also eliminate some of the problems some will see in using existing informational laws to advance a new right of ethical consideration.

A second step would likely be enactment or recognition of legal standing for animals to assert their own claim to a right of ethical consideration in a legal proceeding (or the granting of a *guardian ad litem* to do so on their behalf).¹⁹⁸ From a substantive rights standpoint, as discussed further in the next section, such rights need to be appropriate to the species in consideration and their capabilities. What is intended are minimum rights that would allow the species to fulfill its capabilities and live a meaningful life with little or no interference from humans.

Elephants of course might be the easy case for a right of ethical consideration. But as science illuminates the capabilities of other species, they too deserve the same consideration, and ultimately rights. As

195. See Seibert, *supra* note 12, at 29–30.

196. Kan. Stat. Ann. § 21-6503(a) (2012).

197. See, e.g., *Finstad v. Washburn University of Topeka*, 845 P.2d 685, 690 (Kan. 1993).

198. See, e.g., Cass Sunstein, *Standing for Animals (With Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1365 (2000).

illustrated in Figure 1, perhaps the loftiest goal of a right of ethical consideration is some universal understanding that all species have their own unique capabilities, and we should seek to minimize our impact on them even where the science is not yet robust. Ultimately, perhaps, all non-human animals should have the right to simply be left alone, which may be considered the hallmark of right to liberty that humans seek.¹⁹⁹

Finally, the right of ethical consideration I seek is not completely hypothetical. As Martha C. Nussbaum has pointed out, “there is a happy harbinger of what may be a new era in law, in the form of a remarkable 2016 opinion.” In that case, the Ninth Circuit ruled that the U.S. Navy violated the law in seeking to continue a sonar program that impacted the behavior of whales.²⁰⁰ While the decision is largely “a technical exercise in statutory interpretation of the Marine Mammal Protection Act,” what Nussbaum finds “significant, and fascinating, is that the argument relies heavily on a consideration of whale capabilities that the program disrupts.”²⁰¹

Effects from exposures below 180 dB can cause short-term disruption of abandonment of natural behavior patterns. These behavioral disruptions can cause affected marine mammals to stop communicating with each other, to flee or avoid an ensonified area, to cease foraging for food, to separate from their calves, and to interrupt mating. LFA sonar can also cause heightened stress responses from marine mammals. Such behavioral disruptions can force marine mammals to make trade-offs like delaying migration, delaying reproduction, reducing growth, or migrating with reduced energy reserves.²⁰²

Thus, according to Nussbaum, the court “recognize[s] whales as beings with a complex and active form of life that includes emotional well-being, affiliation, and free movement: in short, a variety of species-specific

199. See, e.g., Steven J. Heyman, *Constitutional Perspectives: Article: The First Duty Of Government: Protection, Liberty And The Fourteenth Amendment*, 41 DUKE L.J. 507, 517 n.52 (1991) (“A positive right or liberty is a right to act in a particular way, or to receive or possess a particular thing, whereas a negative right or liberty is a right to be free from interference or coercion); see also 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 124 (St. George Tucker ed., 1803 & photo. reprint 1969) ([T]he principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature, but which could not be preserved in peace without that mutual assistance and intercourse which is gained by the institution of friendly and social communities”).

200. See *id.* at 1142; see generally JOSHUA HORWITZ, WAR OF THE WHALES: A TRUE STORY (2015) (describing the sonar program in detail).

201. Nussbaum, *supra* note 30, at 625.

202. *Id.* at 625 (quoting *Pritzker*, 828 F.3d at 1130–31).

forms of agency. The opinion goes well beyond Bentham, and it also eschews the anthropocentric approach.”²⁰³

Let’s hope she is right, and this slender decision is “a new era in the law of animal welfare.”²⁰⁴

IV. Critical Review: How Does a Legal Right of Ethical Consideration for Non-human Animals Compare to Other Animal Rights’ Theories?

No proposal to advance the rights of non-human animals will go uncriticized. While I do not feel it necessary to respond to the blanket challenges out there regarding expanding our universe of rights to animals,²⁰⁵ I do believe it is fair to address whether a right of ethical consideration addresses some of the common problems with other proposals, like personhood.²⁰⁶ The answer is that I think it does, and quite decisively.

For example, with respect to the utilitarian argument that for an animal to be given rights in our legal system, he or she must be able to “bear legal duties” or be “legally accountable for [his or her] actions.” The capabilities approach shows us that this not the appropriate standard for granting basic rights, whether to humans or non-humans. A child or incapacitated person might not be able to meet these requirements at any given time, but their entitlement to live a meaningful life free of intrusion is not lessened. Even the most incapacitated of us deserve to have our right to happiness, bodily integrity, freedom of movement, etc. protected by the law.

Of course, this brings us back to the concept of “appropriate” rights. This is also one area Wise’s theory of personhood suffered when examined. But look, no one would argue that a 5-year-old child be granted the same rights and freedoms of an 18-year-old adult. Nor would we argue that a person suffering a mental incapacitation be allowed to exercise, at least without guardianship, certain basic economic and legal decision-making. Similarly, no one is arguing that animals be granted all the legal rights afforded humans. That is contrary to the belief that capacities are species-specific. The law needs to take into consideration how best to protect those species-specific capabilities. Perhaps for starter, we need laws prohibiting placing any wild elephant, whale or dolphin into captivity. As of this moment, we do not know how our actions impact the capacities of every animal on earth. Clearly some animals, like dogs and cats, thrive in our company. Others we know don’t, and still for many others science is still

203. Nussbaum, *supra* note 30, at 625.

204. *Id.*

205. See Cupp, *supra* note 5, at 1037–38; Mark Kinver, *Compassionate conservation is ‘seriously flawed’*, BBC NEWS (May 18, 2019), <https://perma.cc/8LVA-MTM7>.

206. See *supra* Part II.B.2.

considering the question. That is the point of a right of ethical consideration—it provides an opportunity for non-human animals to have their needs considered by us, and then if necessary, protected by appropriate rights.

Finally, for the same reason, a right of ethical consideration also addresses the problem of setting usable precedent for advancing the legal rights of animals that might not meet the current tests of intelligence or autonomy based upon our current scientific understanding. First off, it does not rely upon these types of human characteristics to judge the rights of non-human animals. Instead, it recognizes that every species has unique capabilities, that may or may not be anything we experience. A right of ethical consideration provides a pathway to discover, over time, what these species-specific capabilities are, and to determine how we might protect them from human interference. In this regard, I reject the criticism levied on past approaches of animal rights regarding incrementalism.²⁰⁷ While it is true that a right of ethical consideration may not protect the lives of every animal from the start, is that what animal right advocates really want? Or do we want a system that uses comprehensive tiers of thought to provide the right protections for each species, so that in the long-term all life on earth can live their best lives?²⁰⁸

Conclusion

As I sat here contemplating how best to end this discussion, I found myself watching the 92nd Academy Awards. While deeply distracted by the right of ethical consideration (and all the criticism it may receive), I am interrupted by the awarding of the best actor award to Joaquin Phoenix for his role in the *Joker*, and of course, his passionate acceptance of the award on behalf of all animals:

I'm full of so much gratitude now. I do not feel elevated above any of my fellow nominees or anyone in this room, because we share the same love – that's the love of film. And this form of expression has given me the most extraordinary life. I don't know where I'd be without it. But I think the greatest gift that it's given me, and many people in [this industry] is the opportunity to use our voice for the voiceless. I've been thinking about some of the distressing issues that we've been facing collectively.

I think at times we feel or are made to feel that we champion different causes. But for me, I see commonality. I think, whether

207. See, e.g., Bryant, *supra* note 4, at 288–89.

208. See Singer, *supra* note 94, at 2 (“The basic principle of equality does not require equal or identical treatment; it requires equal consideration. Equal consideration for different beings may lead to different treatment and different rights.”).

we're talking about gender inequality or racism or queer rights or indigenous rights or animal rights, we're talking about the fight against injustice. We're talking about the fight against the belief that one nation, one people, one race, one gender, one species, has the right to dominate, use and control another with impunity.

I think we've become very disconnected from the natural world. Many of us are guilty of an egocentric world view, and we believe that we're the center of the universe. We go into the natural world and we plunder it for its resources. We feel entitled to artificially inseminate a cow and steal her baby, even though her cries of anguish are unmistakable. Then we take her milk that's intended for her calf and we put it in our coffee and our cereal.

We fear the idea of personal change, because we think we need to sacrifice something; to give something up. But human beings at our best are so creative and inventive, and we can create, develop and implement systems of change that are beneficial to all sentient beings and the environment.

I have been a scoundrel all my life, I've been selfish. I've been cruel at times, hard to work with, and I'm grateful that so many of you in this room have given me a second chance. I think that's when we're at our best: when we support each other. Not when we cancel each other out for our past mistakes, but when we help each other to grow. When we educate each other; when we guide each other to redemption.

When he was 17, my brother [River] wrote this lyric. He said: "run to the rescue with love and peace will follow."²⁰⁹

You can imagine my excitement hearing these words at that exact time. Perhaps my ideas were not so extreme after all was my first thought. Quickly, it settled into my mind that this should not just be another profound assertion of our disconnect with the natural world and treatment of non-human animals. Too many similar thoughts have been uttered over the centuries. It is time to undertake a change in how we consider our impact on other species. Perhaps to build upon Martha C. Nussbaum's thought, a right of ethical consideration is a first step in "a new era" of human/non-human relations.

209. Christy Piña, *Oscars: Read Joaquin Phoenix's Best Actor Speech*, THE HOLLYWOOD REPORTER (Feb. 9, 2020), <https://perma.cc/AV2B-Y7S3>.
